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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 1[redacted]400

FIFTH AND WALNUT, INCORPORATED and ALBERT J. HOFFMAN,

Petitioners,

—against—

LOEW'S, INCORPORATED, MARCUS LOEW BOOKING AGENCY, INC., RKO RADIO PICTURES, INC., PARAMOUNT PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNITED ARTISTS THEATRE CIRCUIT, INC.,

Respondents.

PETITION FOR REHEARING

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HERBERT J. FABRICANT
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Of Counsel.

December, 1949.

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LOEW'S, INCORPORATED, MARCUS LOEW BOOKING AGENCY, INC., RKO RADIO PICTURES, INC., PARAMOUNT PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, COLUMBIA PICTURES CORPORATION, UNITED ARTISTS CORPORATION, UNITED ARTISTS THEATRE CIRCUIT, INC.,

Respondents.

PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray for a rehearing and reversal of the order entered December 5, 1949, denying their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. This petition for rehearing is based upon substantial grounds available to petitioners, although not previously presented.

I

Persons or corporations, injured in their business or property by reason of action which offends the Anti-Trust laws, are endowed with the right to sue therefor (Act of Oct. 15, 1914, C. 323, §4, 38 Stat. 731; 15 U. S. C. 15); and, in certain circumstances, to offer and have received as proof in support of their cause "a final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by * * * the United States under the anti-trust laws to the effect that a defendant has violated said laws." (Act of Oct. 15, 1914, C. 323, §5, 38 Stat. 731; 15 U. S. C. 16.) The petitioners brought suit under the first of these statutes and, during the course of trial, unsuccessfully sought to offer in evidence the adjudications of illegality made final by this Court in *United States of America* v. *Paramount Pictures Inc., et al.*, 334 U. S. 131 (R. 2103a).

The United States Court of Appeals for the Second Circuit affirmed the rejection of this offer of proof after noting that this aspect of the petitioners' appeal raised "an important and interesting question of law" (R. 836) which "has not been finally and authoritatively determined" (R. 837). This characterization of the problem was, in our view, an explicit invitation to this Court to review the decision below. This Court (Mr. Justice Douglas and Mr. Justice Clark not participating) denied the petition for a writ of certiorari on December 5, 1949.

Under the circumstances, it may be fairly assumed that the petition herein was denied not because the question(s) presented was unimportant or because it had, in fact, been authoritatively determined but because those who drew the petition should have devoted "a little less time [to] dis-

cussing the merits of their cases[s] and a little more time [to] demonstrating why it [was] important that the Court should hear them." (Vinson, *C.J., Address to 72nd Annual Convention of the American Bar Ass'n*, 18 U. S. Law Week 2117; 70 S. Ct. xiii, xiv.)

It has been said that when the Supreme Court grants a petition for certiorari, counsel will understand that they "are, in a sense, prosecuting or defending class actions" (Vinson, *C.J., id.*). If this is the rubric against which the granting of certiorari is to be measured, it is clear that this cause deserves review.

There are presently pending in the federal court system at least 93 private anti-trust suits against those who were defendants in *United States of America* v. *Paramount Pictures Inc., et al.* (*supra*, p. 2). In most, if not all, of those private anti-trust actions, the plaintiffs, to recover "the fruits of conspiracy" illegally taken from them, must rely upon proof of the national conspiracy originally (and of necessity) unearthed by the government. This proof has already yielded an adjudication of illegality affirmed by this Court. Since that time, an entire industry has looked to this Court for a determination of whether those adjudications of this Court are final within the meaning of 15 U. S. C. 16 and therefore ripe for use by private litigants as intended (see Message of President Wilson, 51 Cong. Rec., Pt. IX, p. 9090). In the absence of a determination of this problem, not only persons and corporations similarly situated to the petitioners—but the respondents as well, must devote their energies and expend large sums of money in an almost impossible effort to duplicate or, as the case may be, resist that which the government has previously done. "It is not fair that the private litigant should be obliged to set up and establish again the fact which the government has proved. He cannot afford, he has not the power, to make use of such

processes of inquiry as the government has command of" (Message of President Wilson, *supra*, p. 3). So long as this Court refuses authoritatively to determine the status of the adjudications of illegality which it has itself affirmed and the use to which they may be put, so long will this unfairness to an entire class of suitors and other victims of monopoly persist.

We are a nation of theatre-goers—served for the most part by the small independent exhibitors. The public and those small exhibitors "have been the victims * * * of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires * * * have been built." As a class, the victims of this manifest unfairness must continue to bear the burdens of and resist this unlawful monopoly. For this Court has refused to rule on the propriety of their efforts to avail themselves of proof of illegality heretofore adduced on trial and confirmed by this Court.

The Chief Justice of the United States has said " * * * the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved" (Vinson, *C.J., Address to 72 Annual Convention of the American Bar Ass'n, supra*, p. 3).

This cause presents just such questions. Having finally determined that the respondents herein had engaged in illegal activity, this Court is under obligation to rule whether the proceedings wherein such adjudications were made, have reached the stage where 15 U. S. C. 16 has real meaning—not in just the present cause but in dozens of other similar cases presently pending. In addition many of those victimized are standing by awaiting the Court's determination before seeking to recover that which was taken from them. This Court's present unwillingness to pass upon that

question will deprive present and prospective litigants of the guidance to which this Court is dedicated.

Consider how the present state of affairs influences the future course of anti-trust litigation in this particular industry. If, after years of investigation by the Department of Justice and legal proceedings initiated as long ago as 1938, the present adjudications of illegality are not final (and by denying certiorari to petitioners, this Court has chosen not to answer that question), then it is probable that the adjudications of *Paramount* will never be final within the meaning of 15 U. S. C. 16. If this is so, then no private litigant victimized by the depredations condemned in *Paramount,* can ever reap the benefits intended in 15 U. S. C. 16; and, as a practical matter, no recovery of that which was usurped by the conspirators may be had.

As the *Paramount* defendants, one by one conclude negotiations with the government and present consent decrees for approval (see Consent Decrees filed in the United States District Court for the Southern District of New York in Equity No. 87-273) it becomes more and more impossible for the *Paramount* litigation to reach a terminal point. Thus, it may well be that the adjudications of illegality affirmed by this Court will remain *in limbo* indefinitely and will never be available as proof in private suits. Surely, the anti-trust laws were not meant to be thus thwarted and frustrated. It cannot be that this Court will sanctify a course of action whereby consent decrees in *Paramount* will become permanent roadblocks preventing a recapture by independent exhibitors of that which was taken from them by the *Paramount* defendants.

Here, indeed, are involved "tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country" (Vinson, *C.J., Address, supra,* p. 3). Here is a legal

dispute, the practical effect of which on other litigants and in other situations is of tremendous import. It is vital that this Court speak and decide whether *Paramount* presently has reached that point where it may be of assistance to those who would proceed and are proceeding under 15 U. S. C. 15. A definitive answer is necessary; even if it be negative, it will be beneficial.

II

The petition for certiorari herein was denied on December 5, 1949. Mr. Justice Clark and Mr. Justice Douglas did not participate in the consideration of this petition.

It is respectfully submitted that in passing on the questions presented by the petition for certiorari this Court should have the benefit of the thinking and experience of those members of the Court.

Mr. Justice Douglas, who wrote the opinions of this Court in *Paramount* and other motion picture anti-trust appeals and Mr. Justice Clark whose prior experience in this field was extensive, in their great wisdom, can be of great assistance to this Court in appreciating the wide importance of the question(s) presented.

CONCLUSION

It is respectfully prayed that this petition for rehearing be granted and upon rehearing that the order of this Court denying the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit be reversed and the said petition be granted.

Respectfully submitted,

FIFTH AND WALNUT, INCORPORATED,
ALBERT J. HOFFMAN,
Petitioners

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Attorney for Petitioners

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HERBERT J. FABRICANT
MURRAY A. GORDON
Of Counsel

Certificate

Counsel for petitioners certifies that this petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

MONROE E. STEIN
Attorney for Petitioners